NO. 56665-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROGER KAREEM WOODARD,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Susan Adams

No. 19-1-03675-5

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

I. INTRODUCTION

A trial court found Roger Woodard guilty of first-degree attempted murder, first-degree kidnapping, and first-degree burglary after he violently and brutally attacked his ex-wife in front of their three children and repeatedly stopped her from leaving her home. On appeal, Woodard raises three sentencing issues, none of which have merit.

Woodard's kidnapping and attempted murder convictions do not violate double jeopardy; he asserts, for the first time on appeal, that his convictions encompass the same criminal conduct, thereby waiving the issue; and the record demonstrates he waived his right to a jury trial on the aggravators. This court should affirm Woodard's sentence.

II. RESTATEMENT OF THE ISSUES

A. Did Woodard's convictions for first-degree attempted murder and first-degree kidnapping violate double jeopardy where each crime required proof of facts not required by the other?

B. Did Woodard, by raising a same criminal conduct claim for the first time on appeal, waive the issue?

C. Did Woodard's convictions for first-degree attempted murder and first-degree kidnapping have the same criminal intent?

D. Did Woodard waive his right to a jury trial on the aggravating factors when he made a valid waiver in writing and orally; it was a strategic decision; he knew the State would proceed to trial on the aggravators when he waived his right; and he stood by his decision throughout the proceedings?

III. STATEMENT OF THE CASE

A. The trial court found Woodard guilty of first-degree attempted murder, first-degree kidnapping, and first-degree burglary.

Roger Woodard and Kristina Woodard[1] were divorced and had three children together. CP 68. Kristina allowed Woodard to temporarily live with her for a few days after he was evicted from his apartment. CP 68. But when he could not secure new housing, she gave him until the end of September to find a new place. CP 68.

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[1] For clarity, the State will refer to Kristina Woodard by her first name since the defendant and Kristina share the same last name. The State does not intend any disrespect.

On September 26, 2019, Woodard confronted Kristina as she was doing laundry upstairs. CP 68. Already armed with a knife, he asked Kristina if they could work on their relationship and see a therapist. CP 68. Kristina did not want to talk and went to her room. CP 68. As she attempted to close the door, Woodard held the door open, forced his way in, and slashed at Kristina with a knife. CP 68. She fell to the floor, and Woodard continued to attack her as she screamed for her nine-year-old son to call 911. CP 69.

Kristina fled the bedroom and Woodard grabbed her right side, causing her to fall down the stairs. CP 69. Her son exited the room with his phone, but Woodard took the phone and told him to go downstairs to comfort his one-year-old and three-year-old sisters who were crying on the couch. CP 69. Kristina slid down the stairs but Woodard sat on her thighs so she could not move, slashing at her face. CP 69. Kristina attempted to escape through the front door, but Woodard put a knife to her face saying, “don’t make me do this.” CP 69.

Kristina ended up on the floor again and Woodard attempted to close her mouth so she could not scream. CP 69. As Woodard went over to the children, Kristina tried to escape again, but Woodard closed the door and pushed her to the floor. CP 69. With her children watching, Woodard attempted to slash her throat more. CP 69. Woodard went to the children telling them to be quiet, and Kristina wrote "help" with her blood on the kitchen island. CP 69.

Kristina attempted to escape once more: she went to the sliding back door, unlocked it, and tried to get outside. CP 70. Woodard stabbed her in the chest. CP 70. Despite Woodard's efforts, Kristina made it into the backyard where she collapsed on the grass. CP 70. She screamed for help. CP 70.

As Kristina laid on the grass screaming, Woodard walked back through the house, out the front door, and through the side gate. CP 70. Kristina heard the side gate latch and Woodard made his way to her. CP 70. He grabbed her hair, stabbed her in the mouth, and told her to shut up. CP 70. He then stabbed her in

the gut. CP 70. Woodard hopped the fence and calmly walked away. CP 70. Kristina sustained deep lacerations to her face, a deep laceration across her throat, and a stab wound to her mouth, chest, and abdomen. CP 71.

The court found Woodard guilty of attempted murder in the first degree, kidnapping in the first degree, and burglary in the first degree. CP 74-76. The court found the deadly weapon enhancement for all three counts. CP 74-75. Additionally, the court found two aggravators: Woodard committed the crime within the sight or sound of the victim's minor children, and Woodard's conduct during the commission of the offense manifested deliberate cruelty. CP 74-75.

B. Woodard waived his right to a jury trial.

At a hearing a few weeks before trial, with both Woodard and his counsel present, Woodard waived his right to a jury and executed a signed waiver. RP 33-36 (9/21/21); CP 16. The signed waiver states:

> 1. I have been informed and fully understand that I have the right to have my case heard by an impartial jury

> selected from the county where the crime(s) is alleged to have been committed;
>
> 2. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the court;
>
> 3. I freely and voluntarily give up my right to be tried by a jury and request trial by court.

CP 16.

Counsel told the court, with Woodard present in the courtroom, that he advised his client about giving up his right to a jury: "Mr. Woodard has received, I can assure the bench, more advisement on this case, both written and oral, than any client in the Pierce County jail." RP 33 (9/21/21). The court then engaged in the following colloquy with Woodard:

> The Court: I have before me a waiver of jury trial. Is this your signature?
>
> The Defendant: Yeah, it is. That's my signature.
>
> The Court: You were able to go over this with your attorney?
>
> The Defendant: I was.
>
> The Court: Were you able to ask any questions you had about it?

> The Defendant: Yes, I have.
>
> The Court: You understand that, constitutionally, you have the right to a jury trial, and that right exists to your benefit. Do you understand?
>
> The Defendant: I do.
>
> The Court: Okay. And it's your wish to waive that right and have a trial by the court, what's called a bench trial?
>
> The Defendant: I do.

RP 34 (9/21/21).

During the hearing, counsel for Woodard furthered the record: "There are other considerations that I'm not going to put on the record that I have advised him of, favoring a bench trial. Having waived both, he's making the decision that he's making here in court today." RP 35 (9/21/21). With Woodard still present, counsel continued to make a record about the plea offer: "The client has been advised, readvised, and then readvised about the benefits or detriments of that offer . . . [the prosecutor] is now pulling that deal as a result of noting this matter up for

trial. And in the event the state prevails, they're going to be asking for an exceptional sentence . . ." RP 36 (9/21/21).

C. The trial court imposed an exceptional sentence based on the aggravating factors.

Before sentencing, the State filed a sentencing memorandum detailing the offender score and sentencing range for each conviction. CP 48-50. The State asked the court to impose an exceptional sentence on the attempted murder conviction and to run the kidnapping conviction consecutive to the attempted murder pursuant to RCW 9.94A.589(b). RP 9-11 (2/4/2022); CP 48-50. Defense then asked for a standard range sentence. RP 9-11 (2/4/2022).

Although the trial court did not enter findings of fact and conclusions of law, it imposed an exceptional sentence, finding substantial and compelling reasons to impose a sentence above the standard range based on the two aggravating factors. CP 74-75; RP 13-14 (2/4/2022). The court sentenced Woodard to 480 months: a 340-month exceptional sentence on the attempted murder conviction, 68-months on the kidnapping conviction to

run consecutive to the attempted murder conviction, and 72 months of deadly weapon enhancements. RP 15-16 (2/4/2022); CP 58.

IV. ARGUMENT

A. Woodard's Convictions for Attempted First-Degree Murder and First-Degree Kidnapping Do Not Violate Double Jeopardy.

This court should affirm Woodard's sentence because his convictions for first-degree kidnapping and first-degree attempted murder do not violate double jeopardy since each conviction required proof of facts the other did not.

Both the Washington State Constitution, article I, section 9 and the fifth amendment to the federal constitution provide the same protection against double jeopardy. *State v. Muhammad*, 194 Wn.2d 577, 616, 451 P.3d 1060 (2019). These provisions "'protect[ ] not only against a second trial for the same offense, but also 'against multiple punishments for the same offense.'" *Id*. (citing *Whalen v. United States,* 445 U.S. 684, 688, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). The legislature has the power,

subject to constitutional limitations, to define crimes and assign punishments. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." *State v. Freeman*, 153 Wn.2d 765, 771, 108 P.2d 753 (2005).

A double jeopardy violation is a manifest constitutional error that may be raised for the first time on appeal. *State v. Brewer*, 148 Wn. App. 666, 673, 205 P.3d 900 (2009). Whether separate convictions violate double jeopardy is reviewed de novo. *In re Pers. Restraint of Knight*, 196 Wn.2d 330, 336, 473 P.3d 663 (2020). Vacation of the lesser conviction is required when double jeopardy has been violated. *Calle*, 125 Wn.2d at 776.

When determining whether two convictions and sentences violate double jeopardy, the court first determines "whether the legislature 'authorized cumulative punishments for both crimes,'

either via 'express or implicit legislative intent.'" *Knight*, 196 Wn.2d at 336. If that does not provide an answer, the court turns to a rule of statutory construction often termed the "same elements" test, the "same evidence" test, and the "*Blockburger* test."[2] *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 29 (2004). Here, the legislature did not expressly authorize cumulative punishments for both crimes, so the court turns to the *Blockburger* test and analyzes whether the crimes are the same in law and fact. *See Blockburger*, 284 U.S. at 52.

1. Woodard's convictions each required proof of facts the other did not.

Under *Blockburger*, the court determines whether each statutory provision requires proof of a fact which the other does not. *Knight*, 196 Wn.2d at 337 (citing *Freeman*, 153 Wn.2d at 772). In other words, double jeopardy attaches when the "'evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the

[2] *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

other.'" *Orange*, 152 Wn.2d at 816 (citing *State v. Reiff*, 14 Wn. 664, 45 P. 318 (1896). When one of the two crimes is an attempt crime, the abstract term "substantial step" must be given a factual definition to assess whether the attempt crime requires proof of a fact that is not required in proving the other crime. *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 537, 167 P.3d 1106 (2007) (citing *Orange*, 152 Wn.2d at 818). Here, an examination of the facts of Woodard's case indicate that his convictions are not the same in fact.

The State charged Woodard with attempted first-degree murder, alleging that Woodard, "with intent to commit the crime of murder in the first degree, as prohibited by RCW 9A.32.030(1)(a), [took] a substantial step toward the commission of that crime." CP 43-44. Under RCW 9A.32.030(1)(a), a person is guilty of first-degree attempted murder when, "[w]ith premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." The State also charged Woodard with first-degree kidnapping under

RCW 9A.40.020(1)(c), in that, he intentionally abducted Kristina Woodard with the intent to inflict bodily injury on her. CP 45. "Abduct" means to restrain a person by either secreting or holding the person in a place where that person is not likely to be found *or* using or threatening to use deadly force. RCW 9A.40.010(1), (2). Restraint means to "restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his or her liberty." RCW 9A.40.010(6).

In *Orange*, the court looked at whether the crimes of first-degree attempted murder and first-degree assault violated double jeopardy when both crimes were based on the same shot, directed at the same victim. 152 Wn.2d at 816-821. The court held that the crimes violated double jeopardy because "the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault." *Id*. at 820.

Woodard's reliance on *Orange* is misplaced. Here, unlike *Orange*, both crimes are not based on the same act(s) directed at the victim. The court in the instant case defined "substantial step" for attempted murder in its findings: "slashing Kristina numerous times on her face and neck, and stab[ing] her in the chest, abdomen, and mouth." CP 71. The court's findings for attempted murder primarily included the injuries to Kristina, but these facts alone were insufficient to prove kidnapping. Merely demonstrating that Kristina was stabbed and slashed did not prove Woodard restricted Kristina's movements by either (1) secreting or holding her in a place where she was not likely to be found, or (2) the use or threatened use of deadly force. RCW 9A.40.020(1)(c); RCW 9A.40.010(1), (6).

The trial court's findings demonstrate which additional facts were necessary to prove kidnapping that did not support the court's findings for attempted murder: (1) "when Kristina attempted to leave, the first time, the defendant held a knife to her face saying, 'don't make me do this'"; (2) "the defendant [ ]

pinned Kristina down . . .”; (3) “[t]he defendant took the phone from D.W. after Kristina told him to call 911”; and (4) “[w]hen Kristina tried to leave the second time, the defendant closed the door [and] pushed her to the floor . . . .” CP 72-73. Although some of the stabbings were used in the court’s findings for kidnapping, it is evident the court also found Woodard restrained Kristina by holding her down, pushing her to the floor, and threatening her with a knife. CP 72-3. The court used each of these facts to find Woodard guilty of kidnapping, but not attempted murder.

It is also evident the trial court did not use the stabbings alone to prove restraint because the court found Woodard restrained Kristina, not only by the use and threatened use of deadly force, but also by holding her in a place where she was not likely to be found. CP 72-73 (“the defendant kept Kristina in the home knowing she was in a place where no one would likely find her and took away her ability to get help through her son”). The court’s findings demonstrate the kidnapping conviction

required facts that exceeded Woodard using a knife to repeatedly stab Kristina.

The facts of the kidnapping were also insufficient to prove the attempted murder conviction. The court's findings for kidnapping included three separate injuries: Woodard "pinned Kristina down as he slashed her with a knife"; "[w]hen Kristina tried to leave the second time, [Woodard] closed the door, pushed her to the floor, and slashed at her throat"; and "[d]uring Kristina's third attempt to escape, [Woodard] stabbed her in the chest." CP 72-73. Woodard argues that the fact finder used the same facts for both restraint and substantial step—"[his] use of the knife to repeatedly stab Kristina." Br. of Appellant 10. However, the courts findings for kidnapping were limited to three separate injuries, while the attempted murder conviction encompassed all the injuries Kristina sustained.

It is evident the facts for attempted murder were not limited to three separate injuries when looking at the trial court's findings for "substantial step": "slashing Kristina numerous

times on her face and neck, and stab[ing] her in the chest, abdomen, and mouth." CP 71. The court specifically included the injuries to Kristina's mouth and abdomen that occurred when Kristina was in the backyard after the kidnapping ceased. CP 70; *see State v. Classen*, 4 Wn. App. 520, 532-33, 422 P.3d 489 (2018) (determining a kidnapping continues for the duration of the unlawful detention). The facts of this case are distinguishable from *Orange* where both convictions encompassed the same shot, same bullet, same victim, and same injury. *Orange*, 152 Wn.2d at 801. Instead, here, the attempted murder conviction required facts that exceeded the kidnapping.

Woodard's convictions do not violate double jeopardy because the trial court's findings indicate each conviction required proof of facts the other did not. Therefore, the court should affirm Woodard's sentence.

B. Woodard Waived the Issue that his Convictions Encompass the Same Criminal Conduct.

Woodard, for the first time on appeal, claims his convictions for kidnapping and attempted murder encompass the

same criminal conduct. Br. of Appellant at 12. Because he failed to make this argument before the trial court, Woodard has waived the issue.

Issues not raised in the trial court may not be raised for the first time on appeal. RAP 2.5(a). Unless there is an invitation by defense, a trial court should not be required to identify the presence or absence of a same criminal conduct issue. *State v. Nitsch*, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000). "Application of the same criminal conduct statute involves both factual determinations and the exercise of discretion," and failure to raise the matter at sentencing results in waiver. *Id*. at 523; *see In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618, 625 (2002); *In re Pers. Restraint of Shale*, 160 Wn.2d 489, 496, 158 P.3d 588 (2007).

Here, Woodard failed to argue before the trial court that his convictions encompassed the same criminal conduct. Prior to sentencing, the State filed a sentencing memorandum noting the sentencing ranges for each of Woodard's convictions. CP 48-50.

The State referenced that memorandum when it asked the court to impose an exceptional sentence on the attempted murder and to run the kidnapping and attempted murder convictions consecutive to one another pursuant to RCW 9.94A.589(b). RP 5, 8 (2/4/2022); CP 48-50. Defense then asked the court for a standard range sentence. RP 5, 8 (2/4/2022). Counsel did not argue that Woodard's convictions encompassed the same criminal conduct, that his convictions should not run consecutive to one another pursuant to statute, or that the State incorrectly calculated Woodard's offender score. RP 9-11 (2/4/2022). Because Woodard failed to argue that his convictions encompassed the same criminal conduct, and this analysis requires a factual determination and an exercise of discretion by the trial court, he has waived the issue.

Yet, even if the court determines that Woodard can raise this issue for the first time on appeal, his convictions did not involve the same criminal conduct.

1. Woodard's convictions did not have the same criminal intent.

When calculating an offender score, "[t]wo or more current offenses and prior offenses are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct." *State v. Lopez*, 142 Wn. App. 341, 351, 174 P.3d 1216, 1222 (2007); *see* RCW 9.94A.589(1)(a). If a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, as was the case here, a court must run the sentences consecutive to one another. RCW 9.94A.589(1)(b). It is the defendant's burden to establish crimes constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013).

Crimes constitute the same criminal conduct when "they require the same criminal intent, are committed at the same time and place, and involve the same victim." *Id*. If any element is missing, multiple offenses will not constitute the same criminal

conduct. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). A court will not disturb a trial court's determination absent abuse of discretion or misapplication of the law. *See State v. Anderson*, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). Here, although the crimes involved the same victim, they did not have the same criminal intent.

When determining whether two crimes require the same criminal intent, the relevant inquiry is to what extent, viewed objectively, did the defendant's criminal intent change from one crime to the next. *See State v. Johnson*, 12 Wn. App. 2d 201, 211, 460 P.3d 1091 (2020). The court first looks at the relevant statute, identifying the objective intent requirement of each crime. *Id*.; *see State v. Chenoweth*. 185 Wn.2d 218, 223-24, 370 P.3d 6 (2016) (determining that, "objectively viewed, under the statutes, the two crimes involve separate intent."). If under the statute, the "intents are different, the offenses will count as separate crimes. If they are the same, [the court will] next 'objectively view' the facts usable at sentencing to determine whether a defendant's

intent was the same or different with respect to each count." *State v. Hernandez*, 95 Wn. App. 480, 484, 976 P.2d 165 (1999) (citing *State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.3d 868 (1991)).

The court in *State v. Latham* analyzed whether the crimes of first-degree attempted murder and first-degree kidnapping encompassed the same criminal conduct. 3 Wn. App. 2d. 468, 416 P.3d 725 (2018). The court determined that, under the statutes, the two crimes necessitate discrete intents: first-degree kidnapping requires an intentional abduction with the intent to facilitate the commission of a felony and attempted murder requires the specific intent to cause the death of another person. *Id*. Therefore, the kidnapping and attempted murder convictions did not constitute the same criminal conduct. *Id*.

Here, as in *Latham*, first-degree kidnapping and first-degree murder have different intents. Kidnapping in this case required the intentional abduction of another person with intent to "inflict bodily injury[.]" RCW 9A.40.020. First-degree murder, on the other hand, required an "intent to cause the death

of another person." RCW 9A.32.030. Intent to inflict bodily injury and the specific intent to cause the death of someone is not the same; therefore, these crimes did not have the same criminal intent.

Woodard's first-degree kidnapping and first-degree attempted murder convictions do not constitute the same criminal conduct because each crime had a discrete criminal intent. This court should affirm Woodard's sentence.

C. Woodard Waived His Right to Have a Jury Decide the Aggravating Factors.

A criminal defendant can waive his right to have a jury decide any aggravating factor that supports an exceptional sentence. *State v. Trebilock*, 184 Wn. App. 619, 341 P.3d 1004 (2014). The State bears the burden of establishing a valid waiver, and the court reviews de novo the sufficiency of the record to establish a valid waiver. *Id*. "[A] record sufficiently demonstrates a waiver of the right to trial by jury if the record includes either a written waiver signed by the defendant, a personal expression by the defendant of an intent to waive, or an informed

acquiescence." *Id*. (citing *State v. Cham*, 165 Wn. App. 438, 448, 267 P.3d 528 (2011)).

In *Trebilock*, the court looked at whether the defendant waived her right to a jury trial on the aggravators. 184 Wn. App. at 633. The court held that the defendant waived her right when (1) she made a valid jury waiver at the beginning of the trial, even though the State did not charge the aggravators at that point; (2) she failed to object after the court found the aggravators; (3) defendant's counsel acknowledged the trial court's discretion for sentencing because of the aggravators; (4) counsel acknowledged the strategic decision for waiving jury; and (5) counsel acknowledged during trial that certain evidence would go to the court's determination on the aggravator. *Id*. at 633-34.

Here, the hearing regarding Woodard's jury trial waiver showcases a valid waiver. The State first charged the aggravators in its original information on September 27, 2019. CP 4. On September 21, 2021, Woodard filed a waiver that waived his

right to have his case, which included aggravators since its inception, tried by a jury. CP 16. His waiver states:

> 1. I have been informed and fully understand that I have the right to have *my case* heard by an impartial jury selected from the county where the crime(s) is alleged to have been committed;
>
> 2. I have consulted with my lawyer regarding the decision to have *my case* tried by a jury or by the court;
>
> 3. I freely and voluntarily give up my right to be tried by a jury and request trial by court.

CP 16 (emphasis added). Both Woodard and his counsel signed the waiver. CP 16.

At the hearing to discuss this written waiver, the court also engaged in a colloquy with both Woodard and his counsel. Counsel told the court, with Woodard present in the courtroom, that he advised his client about giving up his right to a jury trial. RP 33 (9/21/21) ("Mr. Woodard has received, I can assure the bench, more advisement on this case, both written and oral, than any client in the Pierce County jail."). The court then engaged in the following colloquy with Woodard:

> The Court: I have before me a waiver of jury trial. Is this your signature?
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> The Defendant: Yeah, it is. That's my signature.
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> The Defendant: I do.
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> The Court: Okay. And it's your wish to waive that right and have a trial by the court, what's called a bench trial?
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> The Defendant: I do.

RP 34 (9/21/21).

Counsel for Woodard furthered the record: "There are other considerations that I'm not going to put on the record that I have advised him of, favoring a bench trial. Having waived both, he's making the decision that he's making here in court

today." RP 35 (9/21/21). With Woodard still present, counsel continued to make a record about the plea offer: "The client has been advised, readvised, and then readvised about the benefits or detriments of that offer . . . [the prosecutor] is now pulling that deal as a result of noting this matter up for trial. And in the event the state prevails, they're going to be asking for an exceptional sentence . . ." RP 36 (9/21/21). Just moments after Woodard's record regarding waiving his right to a jury trial, counsel made clear that the State would be seeking an exceptional sentence if it prevailed at trial—a sentence it could only request if the court found the State proved the aggravators beyond a reasonable doubt. RCW 9.94A.535.

Furthermore, the record in subsequent proceedings shows Woodard stood by his decision to waive his right to a jury trial. During closing argument, the State argued that it proved the aggravators beyond a reasonable doubt. RP 900 (10/27/21). Woodard did not object or seek to revisit his waiver. Similarly, when the court delivered its verdict on the aggravators, Woodard

did not object. RP 972-973 (10/28/21). Then, during sentencing, after the State asked for an exceptional sentence of 720 months because of the aggravators, defense counsel acknowledged the court had discretion to go above the standard range. RP 9-11 (2/4/2022) ("I'm asking you to sentence him to a standard range. It's also a massive standard range. And from the bottom end to the top end you have plenty of discretion. I think at some point why 720? Why stop? How about 3,000? What's the point?").

Here, as in *Trebilock*, the record demonstrates Woodard validly waived his right to a jury trial on the aggravators when (1) there was both a written and oral waiver, (2) it was clear by counsel's record, in front of Woodard, that it was a strategic decision to have a bench trial, (3) Woodard knew the State would proceed to trial on the aggravators based on the record at the waiver hearing; (4) the language of Woodard's written waiver indicates he waived his right to have a jury hear his "case"—a case that included sentencing aggravators since it was first charged; (5) Woodard did not object or seek to revisit his waiver

when the State argued it had proved the aggravators beyond a reasonable doubt in closing argument; (6) Woodard did not object to the trial court deciding the aggravating factors; and (7) defense counsel commented on the trial courts discretion at sentencing to go above the standard range. The record in this case demonstrates that Woodard knew the role of the jury, made a strategic decision to waive the jury, and stood by [his] decision throughout proceedings," therefore, validly waiving his right to have a jury determine the aggravating factors. *Id*. at 633.[3]

Woodard is correct that the trial court did not enter the required findings of fact supporting an exceptional sentence. The requirement for written findings is mandatory. *State v. Friedlund*, 182 Wn.2d 388, 393, 341 P.3d 280 (2015); RCW

[3] In the event the court determines that Woodard did not validly waive his right to a jury trial on the aggravators, he argues that this court should reverse and remand to have the trial court strike the aggravators and sentence him within the standard range. Br. of Appellant at 15. However, the appropriate remedy is to remand to the trial court and empanel a jury to consider the existence of the aggravators. *See State v. Thomas*, 166 Wn.2d 380, 392, 208 P.3d 1107, 1113 (2009).

9.94A.535. The remedy for failure to enter written findings of fact and conclusions of law is to remand the case for entry of those findings and conclusions. *Friedlund*, 182 Wn.2d at 395. Late findings may be entered under the procedure outlined in RAP 7.2(e). This court should affirm Woodard's sentence and remand to the trial court to file findings of fact and conclusions of law supporting an exceptional sentence in this case.

V. CONCLUSION

For the foregoing reasons, this court should affirm Woodard's sentence, but remand for the trial court to enter written findings of fact and conclusions of law in support of the exceptional sentence.

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RESPECTFULLY SUBMITTED this 5th day of April, 2023.

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Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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